United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1128

To be argued by
IRVING ANOLIK

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MARIO GIGANTE, JOSEPH SARCINELLA, JOSEPH DENTI, VITO DI SALVO, DIEGO ASARO, ANGELO NOCE, DAVY TREGCAGNOLI, ALFRED BONFIGLIO, LEON BRODERSON, THOMAS VILLANOVA, MILTON WEKAR, VINCENT LANDOLFI, JOSEPH FALCO, BENJAMIN RAUGI, FRANK FORMOSA, DANNY CILENTI, JOSEPH PALERMO, GERALD GIANGREGORIO, NICHOLAS LONGO and PETER PELUSO,

Defendants-Appellees.

On Appeal From the United States District Court for the Southern District of New York.

JOINT APPELLEES' BRIEF FOR APPELLEES JOSEPH SARCINELLA, JOSEPH DENTI, VITO DI SALVO, DANNY CILENTI, GERALD GIANGREGORIO and NICHOLAS LONGO

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1128

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UNITED STATES OF AMERICA,

Appellant,

-against-

MARIO GIGANTE, JOSEPH SARCINELLA, JOSEPH DENTI, VITO DI SALVO, DIEGO ASARO, ANGELO NOCE, DAVY TREGCAGNOLI, ALFRED BONFIGLIO, LEON BRODERSON, THOMAS VILLANOVA, MILTON WEKA, VINCENT LANDOLFI, JOSEPH FALCO, BENJAMIN RAUGI, FRANK FORMOSA, DANNY CILENTI, JOSEPH PALMERO, GERALD GIANGREGORIO, NICHOLAS LONGO and PETER PELUSO,

Defendants-Appellees.

- -x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPELLEES' BRIEF FOR APPELLEES JOSEPH SARCINELLA, JOSEPH DENTI, VITO DI SALVO, DANNY CILENTI, GERALD GIANGREGORIO, and NICHOLAS LONGO

The Government has appealed from an order of Honorable Thomas P. Griesa, United States District Judge for the Southern District of New York, made the 2nd day of February, 1976, granting motions of the appellees and others suppressing Government wire-tap evidence.

The Government had charged Gigante and 24 other defendants with the crimes of conspiracy to conduct and manage an illegal gambling business and with one substantive offense, namely a violation of 18 U.S.C. §1955.

The Government predicated this investigation to a large measure upon electronic surveillance through wiretapping.

The District Court Judge predicated the suppression primarily upon a violation by the Government of 18 U.S.C. §2518(8)(a).

In their brief, the Government concedes that one or more of the conversations of the 20 defendants involved was intercepted during the seven wiretaps allegedly authorized during the investigation. "Each of these defendants either moved to suppress the wiretaps or joined in the motion of a co-defendant who did" (Govt's. Br. p. 2).

It is therefore submitted that the question of standing is not here involved.

In addition to suppressing evidence with respect to the appellees herein, the Court also suppressed evidence with respect to appellees DiSalvo and Falco, with respect to the wiretap orders of November 10, 1972 and November 30, 1972, because of the failure of the prosecution personnel to insert these names in the supporting affidavits for these orders. The Court

obviously found that the Government knew of the existence of DiSalvo and Falco and had reason to suspect that their conversations would be intercepted.

It is to be noted that the Government is not appealing from this order of Judge Griesa with respect to DiSalvo and Falco (See Govt's. Br. p. 2) (220).*

We also wish to bring to this Court's attention the fact that the appellees had made several other motions seeking suppression of evidence for failure to properly minimize (221); the inadequacy of supporting affidavits to sufficiently explain why alternative non-wiretap investigative techniques were not employed (221); the failure of the supporting affidavits to demonstrate probable cause to authorize wiretapping (222); an inordinate delay in serving several of the appellees with inventories under two of the orders with respect to wiretapping (222-223); and that there had been inadequate judicial supervision over the wiretapping operations (223-224).

THE FACTUAL BACKGROUND

In its brief, the Government has detailed the facts and we can subscribe basically to what was set forth. We do feel

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* Numerals in parentheses refer to pages of the transcript of the minutes of the Court below, unless otherwise indicated.

that some elaboration, for the purpose of clarity, is appropriate however.

There was obviously a massive wiretapping campaign conducted by the Federal Bureau of Investigation on telephones in the Bronx, Manhattan, and Queens, each pursuant to an alleged Court order.

On page 3 of the Government's brief, they correctly recite the fact that orders were issued by Judges Gurfein, Motley, Tyler, Carter, Ward, and Bartels. These orders were dated between November 10, 1972 and April 13, 1973 (Gov't. Exhibits 1 through 7).

The tapes obtained during the November 10, 1972 wiretapping order were returned to Judge Gurfein for sealing sometime in December of 1972 (30).

The tapes secured under the remaining six orders, however, were not returned to the issuing judges until January 7th and 8th, 1974 (31-33; GX 71-76). It is, therefore, to be noted that in some instances more than a year expired before the tapes were returned to the issuing judges for sealing.

No explanation was given by the Government for the inordirate and unconscionable delay in returning these tapes to the issuing judges for sealing.

In its opinion below, the Court found that there was no

explanation given.

The order of November 10, 1972, issued by Judge Gurfein, expired November 25, 1972.

The order of November 30, 1972, issued by Judge Motley, expired on December 14, 1972.

The order of December 8, 1972, issued by Judge Gurfein, expired on December 23, 1972.

The order of December 27, 1972, issued by Judge Carter, expired on January 10, 1973.

The order of February 7, 1973, issued by Judge Tyler, expired on February 22, 1973.

The order of March 7, 1973, issued by Judge Ward, expired on March 22, 1973.

The order of April 13, 1973, issued by Judge Bartels, expired on April 28, 1973.

The Court observed (216):

> "The Government has offered no evidence of any excuse whatever regarding the reason why there was a delay of several months, and in some cases more than a year, before the tapes were taken to the issuing judge for a sealing order under Section 8(a)."

While the Court noted that there was no actual "evidence" that the tapes were tampered with, or altered during the time of the delay or at any time, it is nevertheless obvious that

they were not judicially sealed and were in the hands of the investigative agency, namely the F.B.I.

We need only look to the recent history of the Watergate investigation and the more recent Senate Committee disclosures to cause alarm in the hearts and minds of the persons arrested. We believe that this Court must necessarily look with disfavor and distrust upon the inordinate delay involved herein.

At page 138 of the transcript below, it is appropriate to look at the discussion and colloquy between the Court and Assistant United States Attorney Ambler, which reveals that no explanation whatsoever was given for the failure to submit these tapes for prompt judicial sealing:

> "THE COURT: Now, I want to ask you, are you going to put on any evidence of satisfactory explanation, so to speak, for the delay that we have in the record?
>
> MS. AMBLER: No, your Honor. The government doesn't intend to offer any further evidence with respect to that. However, I would ask you Honor to note that in each of the sealing orders signed by the issuing judges, when the tapes were made available to them several months later, each judge noted the fact that the tape recordings were available to the court and then ordered that they be kept in their same sealed condition at the FBI, and so that each judge, with the exception of Judge Bartels, opted not to put a seal on the tapes but that rather they be maintained

> at the FBI where they had been since they were originally recorded.
>
> So in terms of an explanation, it would be that rather than sealing these several months later, the judges simply signed a sealing order indicating that they were ordering the tapes to be kept at the FBI."

It will be noted that the Government took the position that since the F.B.I. had placed seals upon the tapes, that this was sufficient security. The whole purpose, however, of the statute, is to have judicial sealing. The agency which obtains the tapes can hardly be trusted to be impartial and trustworthy with respect to the product of their own activities in securing information leading to indictment against the accuseds in this case.

The Court, as is revealed already in the Government's brief, took the position that the failure of an adequate explanation, and indeed no explanation, for the untimely sealing of the tapes, warranted the suppression sought by the appellees under the statute.

We have also adverted to the fact that a motion was made to suppress on the grounds that the names of known suspects were not mentioned in the supporting affidavits for wiretap orders.

At page 153 of the transcript below, Agent Nalley, who was

the main witness for the Government, admitted that certain names were left out of the supporting affidavits. We know, from the Court's order below that DiSalvo and Falco succeeded in obtaining suppression of two Court orders with respect to wiretapping where their names had not been mentioned in supporting affidavits. Since the Government has not appealed from that portion of the decision below, it is obvious that the ruling becomes the "law of the case".

We wish to note, however, that in Agent Nalley's testimony he said that there were more than two individuals who were so involved. As a matter of fact, he stated that there could have been as many as a half-dozen, and perhaps more, whose names were left out of the supporting affidavits and who would be entitled to the same relief that DiSalvo and Falco had received. The Court below just didn't go into all of the details at that time.

We note, for example, that appellee Cilenti would apparently come within the purview of this self-same omission as DiSalvo and Falco.

We wish to make it crystal clear that there was and is no waiver of this aspect should it ever become germane in the event of a possible further litigation in this matter.

The Government has appealed, of course, only from that aspect of the order below wherein it appears that the Court sup-

pressed evidence because of the omission to properly seal.

Success on any point, of course, is as good as success on all points if it achieves the object which, of course, was the suppression of the tapes.

We wish this Court to know, however, that the appellees herein do not waive any of the other aspects of their motions. We have previously set forth the other grounds which were also urged for suppression of the wiretaps.

While Judge Griesa did not find merit to the other claims, he did not conduct extensive hearings with respect to the other claims and we maintain that had such hearings been held in extenso, there would have been more than sufficient evidence, in the opinion of the appellees, to have warranted the granting of one or more of the additional grounds for suppression.

We also ask this Court to note that there has been no concession as to the integrity of the tapes introduced into evidence in the Court below. In other words, no one has stated or conceded that the tapes in fact were kept in a properly sealed condition and, as a matter of fact, the contrary is the insinuation.

The delay herein, we maintain, gives rise to a presumption that the seals may not have been put on when the F.B.I. claimed they were and, additionally, that they could very well have been

tampering with the tapes during the very long period of time, in some cases a year, during which the F.B.I. maintained these tapes without a judicial seal.

We note that on page 4 of the Government's brief, for the first time on appeal they argue that the November 10, 1972 order which produced tapes were the subject of proper sealing. For some reason they cite United States v. Tortorello, Dkt. 75-1376 (2 Cir. April 1976) as support for their statement that they may for the first time on this appeal argue a matter never raised in the District Court.

Since the writer of this brief argued the Tortorello case, it is difficult to perceive how this case is relevant herein. Tortorello was a search and seizure case and involved a situation where the Government took a timely appeal from an adverse order of Judge MacMahon. The Government had also sought reconsideration of the order in Tortorello by setting forth certain grounds which they had not perceived originally. That is a far cry from raising the matter for the first time on appeal.

The Government has otherwise detailed the relevant facts.

PERTINENT PORTIONS OF THE STATUTE INVOLVED

18 U.S.C. §2518(8)(a) provides as follows, inter alia:

"Immediately upon the expiration of the period of the order or extension thereof such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.

. . .

The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use of disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection 3 of section 2517."

18 U.S.C. §2515:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this Chapter."

18 U.S.C. §2518(10)(a):

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a state, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that . .

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insuffi-

cient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

ARGUMENT

POINT I

THE DISTRICT COURT ACTED PROPERLY IN SUPPRESSING THE WIRETAP EVIDENCE.

The position of the appellees herein is that Judge Griesa had no choice but to order the suppression of evidence, which he correctly did. As a matter of fact, it is our position that he should have ordered the suppression of evidence on several grounds rather than on the ground set forth. The effect of suppression, however, is sufficient at this juncture. We wish it to be abundantly clear, however, that the appellees herein do not waive any other aspect of their motions in the Court below.

The appellees maintain that there was an insufficient hearing with respect to such other matters as minimization, probable cause, proper judicial supervision of the wiretapping, and so forth.

We address ourselves to the Government's brief, however, since they do not argue any other aspects of the record.

In Berger v. New York, 388 U.S. 41 (1967), the Supreme Court reversed a bribery-conspiracy conviction that was based on evidence obtained by means of a court-authorized "bug" installed in the defendant's office pursuant to a state statute.

In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court reversed a gambling conviction that was based on evidence obtained by means of a "bug" placed, without prior judicial authorization, upon the outside of a phone booth that the defendant had used.

In both of these cases, the Court held that electronic surveillance was subject to the commandments of the Fourth Amendment. (Id. at 353; 388 U.S. at 50-53).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510-2520 [1970]) was enacted in an attempt to comply with the Katz and Berger cases.

The most significant aspects of Title III of the Omnibus Act are the following:

1. The particularization requirements (identity of the subject and nature of the communication);

2. The time provisions, i.e., the duration of the Court-ordered interception;

3. The minimization requirement;

4. The record-keeping and warehousing provisions;

5. The sealing requirement; and

6. The notice requirement.

There appears to be no definitive decision in this Circuit with respect to the sealing requirements and the effect of an inordinate delay thereon.

The Government relies primarily upon a Third Circuit case, United States v. Falcone, 505 F.2d 478 (1974), cert. den. 420 U.S. 955 (1975).

Without, at this moment, detailing the arguments of the Falcone case, the Court below declared that it was constrained to regard Judge Rossen's dissent in that case as the more persuasive view. The Court below ruled:

> "Respectfully, I am constrained to regard the dissent in Falcone as the more persuasive view. The reasoning of the dissent in Falcone, which I regard as correct, is that Section 8(a) deals specifically with the circumstances under which wire tap can be used or not used as evidence in relation to the judicial sealing requirement. I believe that this specific reference in the statute is directly applicable and is in no way overridden by the more general provisions of Section 10(a).
>
> As I already quoted, Section 8(a) provides that: 'The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication

> or evidence derived therefrom under subsection 3 of Section 2517.'
>
> In my view, the seal provided for by this section is a judicial seal issued immediately upon the expiration of the period of the order, and a judicial order issued months or even a year after the expiration of the wire tap order is in no sense the seal provided for by this section of the statute.
>
> The word 'immediately: [sic] is important. How much time might be encompassed in a given case by the word 'immediately' I do not have to determine, except to say that there is no real contention in the present case that the period of several months or a year in any respect constituted compliance with the word 'immediately.'
>
> In my view, to permit the Government to introduce the wire tap evidence in question would be simply to read out of the statute the provision of 8(a)."

We ask this Court to note that there is a Seventh Circuit order and opinion dated August 20, 1975, a case in which Judge Moore of this Circuit sat as one of the panel, which appears to be helpful and consistent with Judge Griesa's position. While it is true that the Seventh Circuit affirmed in that particular case, which is entitled United States v. Lawson, Docket No. 74-1932, nevertheless, the decision seems to turn on the fact that the defendants there never questioned the integrity of the tapes themselves.

At page 8 of the opinion of the Seventh Circuit in the Lawson case, supra, the Court explains:

> "The government has suggested that the post-interception sealing violations by their nature might not be cognizable under the 18 U.S.C. §2518 (10)(a)(i) suppression section. See Note 6, supra. We do not agree and we hold that the post-interception violations must also be scrutinized to determine if the failures to satisfy the statutory requirements directly and substantially affect the Congressional intention to limit the use of intercept procedures and to comply with Fourth Amendment principles. The Ninth Circuit in United States v. Chun, 503 F.2d 533 (9th Cir. 1974) advocated a three step test to determine whether or not §2518(10)(a)(i) requires suppression for a post-interception failure to comply with statutory requirements:
>
> 1. Whether the particular procedure is a central or functional safeguard in Title III's scheme to prevent abuses;
>
> 2. Whether the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error;
>
> 3. Whether the statutory requirement was deliberately ignored; and, if so, whether there was any tactical advantage to be gained thereby.
>
> See also United States v. Falcone, 505 F.2d 478, (3d Cir., 1974)."

It will be noted that although the Seventh Circuit, as we

have already said, affirmed the judgment in the Lawson matter, they nonetheless seem to be taking Judge Griesa's position with respect to the sealing requirement. Thus, at pages 8 and 9 of the Lawson opinion, the Court continued:

> "We believe that the function of the post-interception procedural requirements is to preserve the integrity of the intercepted conversations and to prevent any tampering or editing of the tapes or other unlawful use. While the substantive pre-order requirements are central to the Congressional purpose of limiting the use of wiretapping as an investigative technique, the post interception integrity measures are also important.
>
> As to appellants' claim that suppression was mandated because the tapes were presented to a different judge than the judge who signed the wiretap order, we find that this is a frivolous argument. The purpose to be served by judicial sealing was accomplished and was no less effective by virtue of the difference of judicial personnel.
>
> We are troubled, however, by the delay of fifty-seven days from the expiration of the interception order to the presentation of the tapes to a judge for sealing. The statute requires that this presentation occur 'immediately' and the difference between 'immediately' and 'fifty-seven days' is not insignificant. We do not assign error to the failure to suppress the tap evidence on this ground because the appellants have not questioned the integrity of the tapes. The purpose of the statute, to insure the integrity of the tapes, thus, was accomplished. The record indicates that the agent had sealed the envelopes containing the tapes immediately after the

> interceptions and when the tapes were presented to the court the sealed envelopes were placed in boxes which were then sealed. The government has sought to excuse the delay by virtue of Agent Aurillo's travel on other assignments. We find this explanation somewhat untenable when juxtaposed to the government's argument that judges are fungible for purposes of sealing wiretap evidence and we again urge the government to comply with statutory wiretap requirements both pre-interception and post-interception to the fullest extent possible, rather than to continue its unenthusiastic approach for the 'technical' requirements demonstrated in this particular case."

It is interesting to note that New York State, in an attempt to create its own constitutionally valid wiretap statute, similarly enacted a mandatory sealing requirement (§700.50[2] Criminal Procedure Law).

The New York Courts have interpreted this to be a mandatory provision.

The use of the word "immediately" in §700.50(2) was not done casually. In comparision to other sections within Article 700, one finds no such similar rigid time requirement. For example, §700.65(4) concerning amendment, requires that application for amendment need only be made "as soon as practical." Likewise, Section 700.50, which requires the People to give notice of overhear, speaks in terms of ". . . within a reasonable time. . ." In fact, throughout Article 700 nowhere does

there appear so strict a mandate as that contained in §700.50(2). Nowhere else is it required that an act under this wiretap statute be accomplished "immediately".

The New York State Court of Appeals, in their recent decision in People v. Sher, 38 N.Y.2d 600, sl.op. no. 43, (February 19th, 1976), states unequivocably that the language of §700.50(2) is to be strictly construed. Judge Jasen, writing the decision for a unanimous Court, held that:

> ". . .we held that the sealing requirements must be strictly construed. The need for rigid adherence to the statutory procedure is explained by the history of our present wiretapping provisions. Until 1968, the Federal Communications Act of 1934 prohibited any person unauthorized by the sender from intercepting and revealing the contents of any communication (citations omitted)."
>
> * * *
>
> "The Federal Communications Act is modified to permit states to intercept wire and telephone communications in accordance with the congressional and constitutional guidelines. (47 USC 605). Thereafter, our state revised its electronic surveillance statute to comply with the federal statute (citations omitted). The provisions of article 700 of the Criminal Procedure Law track, as they must, the language of the federal law. From this review of legislative history, it is clear that the requirements of article 700, which are reflective of controlling federal law, must be strictly construed."
>
> * * *
>
> "Among the congressional requirements was

> the direction that the intercepted wire or oral communications be. . .made available to the judge that issued the warrant for sealing under his direction."

Additionally, it must be remembered that Article 700 exists in derogation of the common law. This fact, in conjunction with the statute's interference with individual privacy and personal liberty, likewise compels strict construction.* Noting the rules for statutory construction established in McKinney's Consolidated Laws of New York, Book 1, Statutes, one finds that strict construction is prescribed for statutes in derogation of the common law.

> "The Legislature in enacting statutes is presumed to have been acquainted with the common law, and generally, statutes in derogation or contravention thereof, are strictly construed. . ."

And, concerning statutes which operate to interfere with individual privacy or liberty, Section 311 points out:

> "A statute which infringes on common right is strictly construed."

In light of the aforementioned authority, there can be no question that when this statute says "immediately", it means

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* See, In Re Mayers, 169 N.Y.S.2d 839 (Ct. of Gen'l. Sess. N.Y., 1957); Tilbro Home Builders, Inc. v. Leidel, 42 A.D. 2d 578, 344 N.Y.S.2d 614, rev'd. on other grounds, 35 N.Y. 2d 347, 361 N.Y.S.2d 895 (1975).

quite literally, "immediately".*

In addition to resolving the issue of strict construction, recent cases have also addressed themselves to whether a defendant must demonstrate prejudice from a failure to seal. The Court of Appeals in People v. Nicoletti, 35 N.Y.2d 249, 356 N.Y.S.2d 855 (1974), conclusively answered this question. In Nicoletti, the People contended that absent a showing of prejudice evolving from non-sealing, the tapes should not be suppressed. In that case no proof was offered that the People had tampered with the tapes. In fact, the defendant did not even make that allegation. Nevertheless, the Court ordered all electronically seized evidence to be suppressed, holding:

> "There is, of course, no indication whatsoever that the tape recordings herein were altered in any way and we intimate no such use. It is the potential for such abuse to which we address ourselves."
>
> * * *
>
> "Through skillful editorial manipulation, alterations may be undetectable, or, if detectable at all, then only by the most sophisticated devices and techniques involving time consuming and expensive analysis by technical experts. While not foolproof, sealing reduces the risk of

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* The term "immediately" is defined in Webster's New World Dictionary, Second Edition, to mean "...without delay, at once; instantly." Black's Law Dictionary, Fourth Edition, notes "the words 'immediately' and 'forthwith' have the same meaning. They are stronger than the expression 'within a reasonable time' and imply prompt, vigorous action without any delay. (Citations omitted).

such manipulation to tolerable limits."

* * *

> "The sealing requirement is to be strictly construed and it is not the defendant's burden to come forward with evidence of tampering when unsealed recordings are sought to be introduced as evidence."

People v. Sher, supra, decided on February 19th, 1976, provided the Court with an opportunity to re-evaluate their position adopted eight months prior in Nicoletti. In a strong reaffirmation, the Court wrote:

> "The sealing requirement was designed to prevent the abuse of wiretap recordings. To that end, as we held in Nicoletti, the requirement must be strictly construed. The burden is on the prosecution to establish due compliance with the statutory procedures. We adhere to the rule announced in Nicoletti."

We recognize that New York State is not a federal jurisdiction, but we believe that the august courts in New York certainly have substantial weight when interpreting a statute virtually identical to the statute hereunder consideration. After all, this Court is seeking to determine the formulation of a rule appertainable to an area which includes the State of New York. It would certainly be helpful if there were consistent interpretations in both federal and state jurisdictions.

As we have already indicated, the prosecution has relied

almost exclusively upon United States v. Falcone, supra, to advance its position.

We submit that the dissent in Falcone, as written by Judge Rossen, is most persuasive. As a matter of fact, it seems to be consistent with the decision in this Circuit in United States v. Poeta, 455 F.2d 117, 2 Cir., cert. den. 406 U.S. 948.

The majority in the Falcone case incorrectly assumed that the provisions of Section 10(a) controlled the absence of a proper judicial seal. Judge Rossen, we believe, quite cogently explains that the suppression must come within the purview of Section 8(a).

In United States v. Poeta, supra, this Tribunal had considered the question of delay in obtaining a judicial seal of wiretap tapes.

In 455 F.2d at 122, this Court noted that the sealing provisions are indeed important. It was found, however, that the New York City police, who delayed getting the judicial seal for about thirteen days because of a mistaken belief that only the original judge could seal it, had set forth good cause for the delay.

In the case at bar it is conceded, and Judge Griesa so found, that there is no good cause shown whatsoever of a delay not of thirteen days, but in some instances, of more than one

year.

Judge Rossen, in the dissent in the Falcone case, finds support for his position in United States v. Giordano, 416 U.S. 505 (1974) and United States v. Chavez, 416 U.S. 562.

We submit that the legislative history also supports the position which we take, namely that the sealing must be done "immediately" and not after some leisurely delay of up to a year or more, as was the case at bar.

See United States Code & Cong. & Admin. News, 2112, 2193, for the year 1968; S.Rep. No. 1097, 90th Cong., 2nd Sess. (1968).

It is obvious that unless the sealing provisions are complied with in accordance with the statutory language, the very thrust of the Congressional legislation is rendered meaningless. Congress was anxious to see that strict limitations be placed upon wiretapping. Thus, the statute involved herein, Subdivision 8(a), must be interpreted, as Judge Griesa holds, strictly.

To do otherwise, would, in effect, mean that the Court is amending the legislation so as to render it meaningless, or to so attenuate it as to render it ineffective.

We do not believe that the thrust of Giordano and Chavez, supra, or of Poeta or Lawson, supra, so intended.

We have previously also adverted to the fact that there were strong arguments advanced why suppression should have been

approved with respect to other motions that were made for failure to minimize, failure to establish probable cause in a proper manner, and so forth. Since the prosecution has not raised these issues at this time, and the prosecution is the one who is appealing, we do not specifically address our brief to them.

We want it plainly understood, however, that the appellees do not waive these points, and submit that adequate hearings would have demonstrated the soundness of their positions and that the record would have established that suppression on other grounds, in addition to improper sealing, were mandated.

We therefore respectfully submit that the Government should not prevail in this appeal, but, on the contrary, for the reasons set forth by Judge Griesa and the thrust of the motions set forth by the appellees and other defendants herein, that the order of the Court below should be affirmed in all respects. We also adopt the briefs of the co-appellees.

CONCLUSION

The order of District Judge Griesa should be affirmed in all respects.

Respectfully submitted,

IRVING ANOLIK
Attorney for Appellees
Joseph Sarcinella,
Joseph Denti,
Vito Di Salvo,
Danny Cilenti,
Gerald Giangregorio and
Nicholas Longo

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

~~NKW~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellant, - *against* - MARIO GIGANTE et al., ~~DEFX~~ Defendants- Appellees.	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 21st *day of* May *1976 at* One St. Andrews Plaza, New York, New York

deponent served the annexed Appellees' Brief *upon*

Robert B. Fiske Jr.

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 21st *day of* May *19* 76

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977